Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ROSE A. DONOVAN and CHARLES A. DONOVAN,
as Parents of TRALANE DONOVAN,

Petitioners,

vs.

SECRETARY OF THE DEPARTMENT OF HEALTH
AND HUMAN SERVICES,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Federal Circuit erred when it affirmed the decision of the United States Court of Federal Claims which determined it had no power to grant petitioners' motion for post-judgment relief under RCFC 60(b), thus abrogating the power inherent in this provision allowing post-judgment relief.

2. Whether the United States Court of Appeals for the Federal Circuit erred when it affirmed the decision of the United States Court of Federal Claims which held that the Special Master was acting within his powers under the Vaccine Act, 42 U.S.C.A. Section 300aa, et seq., when he issued "sua sponte" suspensions of the proceedings, contrary to Section 12(d) et seq. of the Act, and when contrary to Congressional intent, he exceeded the

mandatory time periods applicable to decisions by Special Masters, pursuant to Section 12(g) of the Vaccine Act.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case.

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REPORTS OF OPINIONS BELOW

The Order of the United States Court of Federal Claims is officially reported as Donovan v. Secretary of DHHS, 28 Fed. Cl. 459 (1993) and appears in Appendix A hereto at page 1. The Judgment of the United

States Court of Appeals for the Federal Circuit, dated January 5, 1994, affirming the Claims Court's decision, is not published and appears in Appendix B hereto at page 13. The Order of the United States Court of Appeals for the Federal Circuit, dated February 14, 1994, denying the petitioner's Petition for Rehearing, and declining the petitioner's suggestion for a Rehearing in Banc, is not published and appears in Appendix C hereto at page 14.

GROUNDS OF THIS COURT'S JURISDICTION

The decision of the Court of Appeals for the Federal Circuit was entered on January 5, 1994. A timely petition for rehearing and suggestion for rehearing in banc, filed January 18, 1994, was denied on February 14, 1994.

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The courts below had jurisdiction of this

matter pursuant to 42 U.S.C. Section 300aa-12(f), to review the judgment of the United States Court of Federal Claims, and pursuant to Rule 60(b) of the Rules of the United States Court of Federal Claims, for post-judgment relief.

STATEMENT OF THE CASE

STATEMENT OF FACTS

In 1987, Tralane Donovan (an eight year old infant) and his parents, brought suit in the New York State Supreme Court, Bronx County, seeking damages for neurological injuries that Tralane suffered as a result of the administration in 1979 of diphtheria-pertusis-tetanus vaccinations (DPT vaccine). Included in that suit were the doctor who administered the vaccine and the vaccine manufacturer. In 1990, the Donovans filed a petition under the Vaccine

Act[1] and withdrew the state action, in accordance with the provisions of the Act.

The Donovan claim was suspended for 60 days, with other "unassigned" cases on December 11, 1990 by the chief special master. On May 3, 1991, the claim was again suspended for the "maximum number of days" permitted by the Vaccine Act. (At that time the Act permitted the chief special master to suspend cases no more than 180 days, thus adding another 120 days to the first 60 day suspension.[2]) This suspension by the chief special master meant that this claim had to be decided by the special master no later than 420 days

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[1]References to the "Vaccine Act", or to the "Act" herein refer to the National Childhood Vaccine Injury Act, 42 U.S.C.A. Section 300aa-1 et seq., (West 1991 & Supp 1992)

[2]The number of days was increased to 540 in November, 1991, Pub. L. No. 102-168, Title II, Section 201(c), 105 Stat. 1102, 1003 (1991).

after the petition was filed, or by November 8, 1991.

Special Master Edwards suspended this proceeding again, by order dated November 1, 1991, for 60 days, and then again, by order dated January 2, 1992, for another 60 days.

On January 23, 1992, Special Master Edwards issued his decision denying the petitioner's request for compensation under the Vaccine Act. Petitioner's counsel did not seek review of the special master's decision and at the expiration of the time period for review, on February 25, 1992, the Clerk of the Court automatically entered a judgment based on the special master's decision.

Petitioner's counsel did not receive a copy of the judgment from the court, or from any other source, and thus did not file any election (as provided by the

Vaccine Act) to reject the judgment and to reinstate the state court action within the statutory 90 day period.

PRIOR PROCEEDINGS

On December 29, 1992, petitioners submitted a motion under RCFC 60(b) seeking to vacate the judgment of the United States Court of Federal Claims, entered February 25, 1992. In support of the motion, petitioners argued that the special master's purported suspensions were invalid because they were not issued on the motion of any party. Further, the additional two "suspensions" of 60 days each, extended the pendency of the petition beyond the permitted 420 days. As a result, petitioners argued that the special master was required under rule 12(g) of the Act to give notice to petitioners of their right to withdraw from the program. Further, since they were not given the requisite

notice prior to the entry of judgment, petitioners argued that they were entitled to be given notice and the opportunity to withdraw notwithstanding the entry of the judgment on the special master's decision.

In the alternative, petitioners sought vacatur of the judgment under RCFC 60(b) for the limited purpose of immediately re-entering it, so that a notice of rejection of the judgment can be filed, pursuant to section 21(a) of the Act, thus allowing petitioners to continue to pursue the state court action.

Judge Nettesheim, in Donovan v. Secretary of DHHS, 28 Fed. Cl. 459 (1993) declined to exercise jurisdiction over the petitioners' motion. The court concluded that Widdoss v. Secretary of DHHS, 989 F.2d 1170 (Fed. Cir. 1993), prohibits the Court of Federal Claims from taking any action whatsoever in a Vaccine act case outside

the section 12(e) review process, and that the Court of Federal Claims could not use RCFC 60(b) in Vaccine Act cases. Judge Nettesheim then vacated Special Master Edwards' assignment of petitioners' motion to the Court of Federal Claims and remanded the motion to the special master with instructions to deny the motion. Special Master Edwards issued an order denying the motion and a judgment was entered on this order. Petitioners filed their petition for review with the United States Court of Appeals for the Federal Circuit. The Circuit Court affirmed the Claims Court, denied a petition for rehearing, and declined the suggestion for a rehearing in banc.

This petition follows.

REASONS FOR GRANTING THE WRIT

It is respectfully submitted that Certiorari should be granted for the following reasons:

1. The lower court's refusal to extend jurisdiction and grant post judgment relief by vacating its own judgment under RCFC Rule 60(b) was a misapplication of the rules relative to the review power of the court and ignores the power of RCFC 60(b), to permit the Claims Court to review its own decisions and judgments.

The sole relief sought under RCFC Rule 60(b) was to have the judgment vacated for the limited purpose of allowing the petitioners to reinstate their state cause of action. Petitioners did not seek to challenge the merits of the special master's decision, or to further pursue any claims against the respondent in this proceeding. RCFC Rule 60(b) gives the

district court a 'grand reservoir of equitable power to do justice in a particular case. "Though not a substitute for appeal ... the rule should be liberally construed when substantial justice will thus be served." (Citations omitted). Radack v. Norwegian America Line Agency, Inc., 318 F.2d 538, 542 (2nd Cir. 1963). Unlike the petitioners in Widdoss v. Secretary of DHHS, 989 F.2d 1170, (Fed.Cir. 1993) the petitioners here do not seek to extend their time to appeal or to review the decision below on its merits, rather petitioners seek an opportunity to exercise their right to return to the state court action, relief provided by the Vaccine Act itself, and denial of this right will certainly deprive them of "substantial justice". In G. Heileman Brewing Co., Inc. v. U.S., 792 F. Supp 823 (Ct. Int'l Trade 1992) plaintiff sought an Order vacating an

Order of Dismissal for failure to prosecute, basing its application on the claim that it never received certain notification of the transfer of the case to the Suspension Disposition Calendar nor of the notice of the dismissal of the case for its failure to remove the case from the Suspension Disposition Calendar. The court held that "... rule 60(b)(6) provides a most appropriate rationale to approach Heileman's dilemma" Id at 824, and vacated the Order of Dismissal, and restored the case to the Suspension Disposition Calendar, thus returning the parties to the status-quo prior to the dismissal of the case. Patton v. Secretary of DHHS, 28 Fed.Cl. 532 (June 4, 1993) stated that:

> While the court recognizes that it cannot invoke RCFC 60(b) to review the merits of a special master's decision in the absence of a timely motion for review [citing Widdoss], the court does not interpret the Widdoss decision or the Vaccine Act as precluding the court from

> invoking RCFC 60(b) to relieve a party from a judgment for the limited purposes listed in this rule.

Id at 539, n. 13.

This is the relief the petitioners herein seek. A restoral of the respective positions of the parties **prior** to the entry of judgment, for the sole purpose of allowing petitioners to withdraw from the Vaccine Act compensation program by electing to reject the judgment and then reinstate their New York state action.

2. The Special Master had no authority to issue sua sponte suspension orders which extended the consideration of the petition beyond the statutorily defined period. Such extensions made the decision untimely and which entitled the petitioner to be notified that the petition may be withdrawn from consideration.

The Special Master acted without jurisdiction when he exceeded the time limitations built into Rule 12 of the Vaccine Act, and contrary to Congressional intent, allowed the petition proceedings to extend for 497 days, 76 days in excess of the statutorily set time period.

When the Vaccine Act was first adopted, Congress stressed that it was to provide an "expeditious" alternative compensation system for those injured by routine pediatric vaccinations. The Committee report accompanying the

legislation states that the speed of the compensation program was one of the features that Congress anticipated would "divert a significant number of potential plaintiffs from litigation." See H.R. Rep. No. 908, 99th Cong., 2nd Sess. 12 (1986), reprinted in 1986 U.S.C.C.A.N 6344, 6353. The Act was to provide a "relatively fast" remedy. See Carlson v. Secretary of DHHS, 23 Cl. Ct. 788, 791 (1991). To this end, the Act set mandatory time limits for decisions by special masters and the Court of Federal Claims. Section 12(g)(1) of the Vaccine Act provides that if the special master does not render his decision within the permitted time period, he must give the petitioner written notice of his (the petitioner's) option to continue the proceedings or to withdraw the petition.

Section 12(d)(3)(A) of the Act provides that every petition for

compensation must be decided by the special master as "expeditiously" as possible, but in no event later than 240 days after the petition is filed, exclusive of any "suspensions" authorized by the statute. Suspensions may, under certain circumstances, be issued by either the special master or by the chief special master. Such suspensions may be issued on the "motion" of either petitioner or respondent.

The Joint Statement of Explanation of Amendment to the National Vaccine Injury Compensation Program makes clear that because meeting the deadlines described above was so "basic" to the program, a failure by the special master or the Court to timely decide would result in a loss of jurisdiction to consider the petition:

> ...Additionally, <u>if a special master or court has failed to meet the prescribed deadline, the special master or court will lose</u>

> jurisdiction over the petition 30 days after the notice to the petitioner has been issued. 136 Cong. Rec. H. 9729 (daily ed. Oct. 15, 1990)

The 1991 revision of vaccine Act Rule 21(b) did not diminish the protections afforded petitioners under sections 12(g) and 21(b). Congress's intention to allow petitioners after being informed of their right to withdraw, to elect to continue the proceedings does not undercut the petitioner's right to withdraw should she choose to do so. Therefore it continues to be appropriate to treat any failure to give notice as a jurisdictional defect whose existence can be raised even after a decision has been entered.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the opinion and judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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